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Nos. 83-1573, 83-1657 and 83-1801

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN P. CALANDRA, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES T. LICAVOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LIBERATORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d).

2. Whether the trial court erred in denying petitioner Licavoli's motion for a severance.

3. Whether the trial court's evidentiary rulings were correct.

4. Whether the trial court correctly instructed the jury concerning the predicate offenses of conspiracy and murder.

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OPINIONS BELOW

The opinion of the court of appeals (83-1573 Pet. App. A1-A26) is reported at 725 F.2d 1040. Relevant opinions

of the district court (83-1573 Pet. App. A27-A57, A60-A79; 83-1657 Pet. App. A26-A72; 83-1801 Pet. App. A38-A63) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1984. A petition for rehearing filed by petitioner Calandra was denied on February 17, 1984, and his petition for a writ of certiorari (No. 83-1573) was filed on March 23, 1984. On March 6, 1984, Justice O'Connor extended the time within which petitioner Licavoli could file a petition for a writ of certiorari to and including April 8, 1984 (a Sunday), and his petition (No. 83-1657) was filed on April 9, 1984. A petition for rehearing filed by petitioner Liberatore was denied on March 5, 1984, and his petition for a writ of certiorari (No. 83-1801) was filed on May 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Two sections of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 and 1962, are reproduced at 83-1573 Pet. App. A82-A86.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners and three co-defendants, Pasquale Cisternino, Ronald Carabbia, and Kenneth Ciarcia, were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Petitioner Licavoli was sentenced to ten years' imprisonment. Petitioners Calandra and Liberatore were each sentenced to 14 years' imprisonment.[1]

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[1] Co-defendants Cisternino and Carabbia were each sentenced to 12 years' imprisonment; co-defendant Ciarcia was sentenced to ten years' imprisonment.

1. The evidence at trial showed that between 1976 and 1978 petitioner Licavoli was a leader of organized crime in Cleveland, Ohio; petitioners Calandra and Liberatore played supervisory roles and co-defendants Carabbia, Cisternino, and Ciarcia played subsidiary roles in the organization. Throughout this period, petitioners and their co-defendants sought to establish control over criminal activities in the area by means of murder, wiretapping, and bribery. Pet. App. A2-A3.[2]

a. In the spring of 1976, Licavoli decided to have Danny Greene killed in order to eliminate competition from Greene's criminal activity in the West Cleveland area. Licavoli had a colleague, James Fratianno, contact Raymond Ferritto for the purpose of hiring him to murder Greene (Tr. 1662-1663). After a series of meetings with Licavoli, Calandra, and several of the co-defendants, Ferritto traveled to Cleveland to stalk Greene and, with the aid of Cisternino and Carabbia, to determine his pattern of activities. In August 1977, Ferritto asked Licavoli for money to cover his expenses. Licavoli replied that he would speak with Calandra, who would provide Ferritto with some money. Several days later, in the presence of Calandra, Carabbia gave Ferritto $5,000 to defray expenses he had incurred. Licavoli also promised Ferritto that when the murder was accomplished Ferritto would receive 25% of the proceeds of gambling activities in the Warren and Youngstown areas. Pet. App. A3; Tr. 1725-1726, 1734-1735, 2333-2334. During September 1977, Ferritto and Cisternino attempted unsuccessfully to kill Greene by placing a bomb outside the door of his apartment (Tr. 1751-1757, 2378-2379).

During the same period, Liberatore and an associate, Thomas Lanci, recruited Louis Aratari, an ex-convict who worked for Liberatore, to "tak[e] Danny Greene out with a gun" (Tr. 3115) and to murder five of Greene's

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[2] "Pet. App." refers to the appendix to the petition in No. 83-1573, unless otherwise indicated.

henchmen, including his son (Tr. 3199-3202, 6574). Aratari agreed to commit the murders for $5,000 each and a share in the proceeds of the gang's activities (Tr. 3200-3202). He and a partner, Vic Guiles, then began to stalk Greene. At one point, Liberatore and Calandra showed Aratari some of the places Greene frequented, including his "headquarters" (Tr. 3122-3126). Calandra explained on that occasion that "the other two guys," Ferritto and Carabbia, needed a "back-up team" because, whenever they were in front of a location, Greene would leave by the back (Tr. 3124). Calandra arranged for Ferritto to meet Aratari at a hotel, where they discussed strategies for killing Greene and agreed that Aratari and Guiles would serve as the back-up team for Ferritto and Carabbia (Tr. 1766, 2338-2344, 3139-3147). Thereafter, the two teams made plans to kill Greene when he left or entered his apartment building and to murder his associates with a hand grenade (Tr. 3267-3270, 4911-4913).

On Monday October 3, 1977, Carabbia called Ferritto and set up a meeting for the following day with Licavoli, Calandra, and Cisternino (Tr. 1760-1763, 2354-2355). At the meeting, the defendants, who had wiretapped Greene's telephone, played a recording of Greene's girlfriend making a dental appointment for him for the following Thursday (Tr. 1764-1765, 2355-2356). On Wednesday Carabbia met with Aratari and Guiles. He explained that he had an "inside lead on Danny Greene" and that Greene would be going to the dentist the next day. Tr. 3342, 4933.

On the date of Greene's dental appointment, Cisternino and Ferritto constructed a bomb. Ferritto then drove to the vicinity of the dentist's office with the device in his car; Carabbia followed in a second car with a box into which the device was to be placed. Aratari and Guiles, armed with a high powered rifle, arrived in another car supplied by Ciarcia. The plan was for Guiles to shoot

Greene if possible, with the bomb as a back-up measure. Pet. App. A4.

When Greene arrived for his appointment and entered the dentist's office, Guiles had no opportunity to shoot him. When a parking space opened next to Greene's car, Ferritto placed the bomb in the box on the side of Carabbia's car and parked that vehicle next to Greene's car. When Greene emerged from his appointment, Ferritto and Carabbia drove away in Ferritto's car, and Carabbia detonated the bomb with a remote control device. Pet. App. A4-A5; Tr. 1795-1800, 2370-2372. Greene died as a result of the explosion, and Greene's and Carabbia's cars were destroyed (Tr. 2944, 4597, 4624). The following day, in a conversation intercepted by law enforcement authorities pursuant to a court order, Calandra and Licavoli discussed the bomb and the need to watch out for one of Greene's henchmen (GX 120).

b. During the period covered by the indictment, Geraldine Rabinowitz worked as a file clerk in the Cleveland office of the FBI. Her future husband worked at an automobile dealership where Ciarcia was sales manager (Tr. 538-539). In the spring of 1977, Ciarcia asked that Rabinowitz obtain confidential FBI information concerning investigations of himself, Licavoli, or Liberatore (Tr. 213-214). After some initial hesitation, Rabinowitz furnished Ciarcia with an investigative report on Licavoli (Tr. 214-215, 217-218). Ciarcia showed the documents to Liberatore and made photocopies for him (Tr. 6531-6539). Rabinowitz subsequently agreed to obtain the names of the informants who had furnished the information contained in the report (Tr. 225-229, 243-244). She also furnished Ciarcia and Liberatore with confidential information about wiretaps, license plate numbers of FBI surveillance vehicles, and identities of other informants (Tr. 244-260). During this period Ciarcia promised that he would assist Rabinowitz in obtaining a downpayment on a house for her and her husband (Tr. 313, 549-

550). Liberatore later delivered $15,000 in cash to Rabinowitz to cover the downpayment (Tr. 593-598, 604-609). No interest or schedule of repayment for the loan was set, and no provision was made for collateral (Tr. 916-917).

2. Before the trial in this case, petitioners and their co-defendants were tried in state court for aggravated murder. Cisternino, Carabbia, and Ciarcia were convicted, while Licavoli and Calandra were acquitted; the jury was unable to reach a verdict in the trial of Liberatore.

In May 1979, petitioners, their co-defendants, and Thomas Lanci were charged in a four-count indictment by a federal grand jury (83-1801 Pet. App. A27-A37). Count 1 was the racketeering conspiracy charge at issue in this case. The alleged underlying predicate acts included, inter alia, conspiracy to murder Daniel Greene, murder and aiding and abetting the murder of Greene, and bribery of an FBI employee.[3] The indictment also charged the defendants with conspiracy to commit bribery and with two counts of bribery, based on the scheme to obtain FBI information from Geraldine Rabinowitz. The district court severed the bribery and bribery conspiracy counts and set them for trial first. Licavoli and Calandra were acquitted at that proceeding. Liberatore was convicted on the bribery conspiracy count and on one of the two substantive bribery counts.[4]

The district court then proceeded to trial on the racketeering conspiracy count. Prior to trial, the court ruled that the acquittal of Licavoli and Calandra on the bribery charges barred the government from relying on acts of

[3] Count 1 also alleged that the defendants conspired to murder Greene's associate, John Nardi. However, the district court ruled that this scheme was part of a single conspiracy to murder. Pet. App. A47-A54.

[4] Ciarcia pleaded guilty to the bribery counts; Lanci was convicted on two of the counts; Cisternino and Carabbia were acquitted.

bribery to support the racketeering conspiracy charge against them, leaving murder and conspiracy to commit murder as the only remaining predicate acts in their cases. 83-1801 Pet. App. A51-A58.[5] The court denied the motion of Licavoli and Calandra to sever their cases, but instructed the jury that it should not consider any testimony by Rabinowitz in connection with the case against Licavoli and Calandra.

At the close of the government's case, and again following their convictions, petitioners filed motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29. The court denied those motions, rejecting arguments that a conspiracy to commit murder cannot constitute a predicate racketeering act under 18 U.S.C. 1961 and that the offenses of murder and conspiracy to commit murder cannot constitute separate racketeering predicate offenses because they merge upon conviction for the former offense under Ohio law (Pet. App. A27-A57). See also 83-1657 Pet. App. A42-A72.

3. The court of appeals affirmed (Pet. App. A1-A26). It rejected petitioners' claims that conspiracy to murder could not constitute a racketeering predicate offense and that murder and conspiracy to commit murder could not constitute separate racketeering predicate offenses (*id.* at A6-A12). The court also held (*id.* at A12-A13) that double jeopardy and collateral estoppel principles did not bar the use of murder as a predicate offense for the RICO prosecution, even though petitioners Licavoli and Calandra had been acquitted in state court, citing *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). In addition, the court rejected the contention of Licavoli and Calandra that the district court erred in denying their motion for a severance and

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[5] The district court ruled (83-1801 Pet. App. A55) that in Liberatore's case principles of collateral estoppel required dismissal of the RICO predicate act that arose out of the same conduct as the substantive bribery charge on which he had been acquitted.

that they were prejudiced by evidence offered against their co-defendants concerning the bribery of Geraldine Rabinowitz (Pet. App. A20-A23).

The court of appeals also rejected claims that prior testimony of Ferritto should not have been admitted at trial (Pet. App. A13-A17); that double jeopardy principles barred the government from using bribery as a RICO predicate offense (*id.* at A18-A20); and that the district court erred in refusing to excuse a juror who discovered during the trial that he was acquainted with a government witness (*id.* at A23-A24). The court summarily rejected petitioners' claims that they were prejudiced by various evidentiary rulings, including admission of co-conspirator statements, references to court-ordered electronic surveillance of Licavoli, and references to participation of government witnesses in the Witness Protection Program (*id.* at A20).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, no further review is warranted.

1. Petitioners advance a number of different theories in support of their contention (83-1573 Pet. 5-19; 83-1657 Pet. 19-30; 83-1801 Pet. 9-20) that they could not be convicted of racketeering conspiracy.

a. Petitioner Calandra contends (83-1573 Pet. 5-10) that, because he was acquitted in state court of the murder of Greene, principles of double jeopardy and collateral estoppel preclude use of that murder as a predicate offense supporting his racketeering conspiracy conviction. The court of appeals properly rejected this contention (Pet. App. A12-A13).

It is settled law that an acquittal in state court does not bar a subsequent prosecution based on the same conduct in federal court. See *United States* v. *Wheeler*, 435 U.S. 313, 316-320 (1978); *Rinaldi* v. *United States*, 434

U.S. 22, 28 (1977); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 128-139 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922). As the Court explained in *Lanza* (*id.* at 382), "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The * * * double jeopardy * * * forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."[6]

The Third Circuit, in *United States* v. *Frumento*, 563 F.2d 1083, 1087 (1977), cert. denied, 434 U.S. 1072 (1978), rejected a claim virtually identical to that raised here. The court correctly noted in *Frumento* that the RICO statute does not punish the same crimes as state law. Instead, 18 U.S.C. 1962 establishes a federal crime—racketeering—that is merely defined in part by reference to state law crimes. Moreover, it is most unlikely that Congress would have wished an acquittal in state court to bar a federal racketeering prosecution based on the same offense. If that were the rule, federal prosecutions could be defeated by ineffective prosecution or even corrupt collusion by state officials, or by state procedural nuances, such as restrictive evidentiary rules.[7]

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[6] Thus, contrary to petitioner Calandra's contention (83-1573 Pet. 7), the principle that barred use of the federal bribery offenses of which he had been acquitted was inapplicable to the state murder charge.

[7] Relying on *Bartkus* v. *Illinois*, *supra*, petitioner Liberatore contends (83-1801 Pet. 16-20) that the dual sovereignty principle is inapplicable here because of pervasive federal involvement in the state prosecution. Since Liberatore was not acquitted of Greene's murder (because the jury was unable to reach a verdict in his case), double jeopardy principles would not bar his reprosecution. See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978). Moreover, although the Court noted in *Bartkus* that the state prosecution there was not a "sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution" (359 U.S. at 124), it clearly did not mean thereby to restrict coopera-

b. Petitioners also claim (83-1573 Pet. 10-15; 83-1357 Pet. 26-30; 83-1801 Pet. 9-12) that, by virtue of the operation of Ohio law, the government failed to prove two separate predicate acts of racketeering activity. A conviction under RICO requires proof of the commission of, or conspiracy to commit, at least two acts of racketeering activity. See 18 U.S.C. 1962(c) and (d); 18 U.S.C. 1961(5).[8] Racketeering activity is defined in 18 U.S.C. 1961(1)(A) as, inter alia, "any act or threat involving murder * * *, which is chargeable under State law and punishable by imprisonment for more than one year * * *." Under federal law, a defendant can be convicted of both a substantive offense and conspiracy to commit that offense. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S.

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tion between federal and state law enforcement authorities in investigating and prosecuting acts that violate the laws of both sovereigns. The district court expressly found (Pet. App. A70-A72) that the federal-state cooperation in this case (which consisted primarily of sharing of evidence and expert witnesses) was not of the type that would convert the state prosecution into a sham or cover for a federal prosecution. See also *Bartkus*, 359 U.S. at 122-123.

[8] 18 U.S.C. 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961(5) provides that, as used in the RICO statute,

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

770, 777-778 (1975). However, Ohio Rev. Code Ann. § 2923.01(G) (Page 1982) provides that

> [w]hen a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

Petitioners contend that, because they could not be convicted in Ohio courts of both the murder of Greene and conspiracy to commit that murder, violations of Ohio statutes prohibiting these offenses cannot constitute separate predicate acts for purposes of the federal racketeering statute.

The court of appeals properly rejected this claim (Pet. App. A9-A12). As the court observed (*id.* at A10, A11), although an individual cannot be convicted of, or sentenced for, both murder and conspiracy to commit murder under Ohio law, those offenses are "separately chargeable under [Ohio] law," and each is "punishable by imprisonment for more than one year."[9] The RICO statute does not require that offenses charged as predicate acts be subject to cumulative punishments under state law. Thus, it is no defense to a RICO charge that an Ohio court could not enter separate judgments or impose cumulative sentences for conspiracy and the related substantive offense.[10]

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[9] The crime of aggravated murder is defined in Ohio Rev. Code Ann. § 2903.01 (Page 1982). The crime of conspiracy to murder is defined in *id.* § 2923.01.

[10] Calandra (83-1573 Pet. 12-14) and Liberatore (83-1801 Pet. 11) err in relying on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), to support their contention that the murder and conspiracy offenses merged for purposes of the racketeering statute. In *Phillips*, the court held that under 21 U.S.C. 841(a)(1), distribution of marijuana and possession of the same marijuana with the intent to distribute it constituted the same offense when they were both part of a single

Moreover, variations on the relationship between conspiracy and the underlying substantive offense under state law do not control the definition of racketeering acts under federal law. As the court of appeals observed (Pet. App. A11), the reference to state law in the racketeering statute is for the purpose of defining the conduct prohibited. It is not meant to incorporate state procedural rules. See *United States v. Welch*, 656 F.2d 1039, 1058 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Salinas*, 564 F.2d 688, 690-693 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States* v. *Frumento*, 563 F.2d at 1087 n.8A; *United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Thus, the fact that petitioners could not be convicted separately for particular offenses in state court does not preclude the use of those offenses as separate predicate acts under the RICO statute, especially since, as noted above (page 10 *supra*),

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act and that they could not be charged as separate acts of racketeering in such circumstances. Here the conspiracy to murder and the murder itself clearly did not constitute a single act. The court in *Phillips* noted that the RICO statute required that each racketeering act constitute a "separate crime[]," but was careful to point out that separate crimes need not "be in the context of independent schemes or objectives" (664 F.2d at 1038). Because conspiracy and the related substantive offense are "separate crimes" under both Ohio and federal law, the rationale of *Phillips* is inapplicable here.

Nor is it of consequence that the reviser's note to the Ohio statute prohibiting complicity (Ohio Rev. Stat. Ann. § 2923.03 (Page 1982)) states that an accomplice is one who solicits, procures, or conspires with another to commit an offense, aids or abets its commission, or causes an innocent or irresponsible person to commit the offense. See 83-1573 Pet. 12. The trial court here did not define the offense of murder in terms of conspiring; rather, it discussed aiding and abetting murder in terms of willful participation in commission of the murder (C.A. App. 564-566). As the court below observed (Pet. App. A10-A11), Ohio has adopted the common law view that conspiracy and the substantive crime are separate offenses, even though it has now chosen to prohibit cumulative convictions and punishments.

conspiracy and the substantive object offense are separate crimes under federal law.[11]

c. Petitioner Licavoli contends (83-1657 Pet. 23-26) that, in any event, 18 U.S.C. 1961(1) does not embrace conspiracy to commit murder as a racketeering predicate offense. The court of appeals properly rejected that contention (Pet. App. A6-A9).

As this Court recently reiterated in *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4 (quoting

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[11] Licavoli errs in relying (83-1657 Pet. 29-30) on *United States* v. *Mason*, 213 U.S. 115 (1909), to support his contention that merger of the murder and conspiracy offenses under state law should govern the federal racketeering prosecution. In *Mason* the defendants were charged with conspiring to hinder or obstruct federal officers in the exercise of rights secured to them under the law of the United States and with murdering a federal officer as part of the conspiracy. The conspiracy was alleged to violate Rev. Stat. § 5508 (1875 ed.). A companion provision, Rev. Stat. § 5509 (1875 ed.), provided that "if in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed." See 213 U.S. at 119. The Court noted (*id.* at 123) that the question before it—the effect of the defendants' acquittal of murder in state court—was a narrow one, involving "an inquiry as to the meaning and scope of § 5509." It held that, because the defendants had been acquitted of murder by the state courts, Section 5509 was inapplicable. The Court reasoned that "[t]he murder in question, if committed at all, was, as a distinct offense, a crime only against the State, and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them." 213 U.S. at 124 (emphasis in original).

The holding in *Mason* is inapposite in the context of the RICO statute, which does not merely adopt for sentencing purposes "a distinct offense, a crime only against the State" (213 U.S. at 124). Rather, the RICO statute defines criminal activity punishable under federal law by reference to state law to identify the type of activity that is federally prohibited. See *Frumento*, 563 F.2d at 1087 (noting that "[t]he murder at issue in *Mason* did not constitute an offense against the United States").

United States v. *Turkette*, 452 U.S. 576, 580 (1981)), "'[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as exclusive."'" 18 U.S.C. 1961(1)(A) broadly defines as racketeering activity "any act or threat involving murder [or other enumerated generic crimes] which is chargeable under State law and punishable by imprisonment for more than one year." Conspiracy to commit murder, an offense prohibited by Ohio law and punishable by imprisonment for over a year, plainly falls within the literal terms of that section. See Pet. App. A6.

The holding of the court of appeals is in accord with decisions of other courts of appeals, which have concluded that conspiracy can constitute a predicate offense in the context of Section 1961(1)(A) and analogous provisions of the RICO statute. See *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir. 1984) ("conspiracy to commit murder qualif[ies] as a RICO predicate act under Group A, § 1961(1)(A)"); *United States* v. *Welch*, 656 F.2d at 1063 n.32 (the language of subsection A appears to contemplate conspiracy to commit murder); see also *United States* v. *Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983) (conspiracy to obstruct, delay, or affect commerce by robbery, extortion or physical violence constitutes a predicate act under 18 U.S.C. 1961(1)(B)); *United States* v. *Phillips*, 664 F.2d at 1015 (conspiracy to import drugs may properly be alleged as a predicate act of racketeering under 18 U.S.C. 1961(1)(D)); *United States* v. *Weisman*, 624 F.2d 1118, 1123-1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980) (conspiracy to commit securities fraud or bankruptcy fraud qualifies as predicate act under Section 1961(1)(D)).[12]

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[12] Licavoli errs in relying on *United States* v. *Bagaric*, 706 F.2d 42, 62 n.17 (2d Cir. 1983), cert. denied, Nos. 82-6911, 82-6925 (Oct.

Licavoli notes (83-1657 Pet. 23-24) that one of the precursors of the RICO statute defined criminal activity as any one of a number of enumerated generic crimes and "any conspiracy to commit any of the foregoing offenses." He contends that omission of the reference to conspiracy in the final version of the statute the following year demonstrates Congress's intent not to make conspiracy a separate act of racketeering (83-1657 Pet. 24). But that omission does not constitute the sort of "clearly expressed" legislative history that would defeat the otherwise "conclusive" effect of the statute's unambiguous language. See *Russello* v. *United States*, slip op. 4, 10. The RICO legislation that was ultimately enacted was significantly different from the bills of the previous year, and the legislative history contains no explanation for the particular omission on which Licavoli relies. See Pet. App. A41. In view of the broad language used in the final version of the legislation, the reference to conspiracy may have been omitted simply because it was regarded as redundant. Moreover, in view of Congress's purpose to reach high-ranking racketeers, as well as "street-level" employees of racketeering enterprises, it seems most unlikely that Congress meant to immunize those who do not personally involve themselves in racketeering activities, but participate only as conspirators. See Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note (provisions of RICO are to "be liberally construed to effectuate its remedial purposes"); *Russello* v. *United States*, slip op. 10-11; *United States* v. *Ruggiero*, 726 F.2d at 919 (legislative purpose of RICO statute

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3, 1983), No. 83-5206 (Oct. 17, 1983), to support his claim that the Second Circuit has limited the reasoning of *Weisman* to conspiracies charged as predicate acts under Section 1961(1)(D). In *United States* v. *Ruggiero*, 726 F.2d at 918-919, 921, the Second Circuit held that its reasoning in *Wiesman* extends to murder conspiracies charged as predicate acts under Section 1961(1)(A).

supports conclusion that conspiracy to murder constitutes an act of racketeering activity under the RICO statute).

d. Petitioner Calandra maintains (83-1573 Pet. 15-19) that, at least as to a racketeering conspiracy charge under 18 U.S.C. 1962(d), conspiracy to murder and the substantive offense of murder cannot constitute the two predicate acts necessary to support a conviction. That claim is without merit.

Contrary to Calandra's claim (83-1573 Pet. 18), it is not redundant for a conspiracy charge to constitute a predicate offense for a violation of 18 U.S.C. 1962(d). As the Second Circuit explained in *United States* v. *Ruggiero*, 726 F.2d at 923, "[a] RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' * * *, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to 'participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" See also *United States* v. *Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981), in which the court explained that a conspiracy may properly constitute a predicate offense in connection with a RICO conspiracy charge because "[t]he essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering." [13]

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[13] The district court instructed the jury that, in order to convict on the RICO conspiracy count, it must find that the defendants "conspired together to violate 18 U.S.C. § 1962(c) by being associated with an enterprise engaged in activities which affected interstate commerce and the purpose of which was to control the criminal activities in various cities in the Northern District of Ohio by means of murder, bribery, and other activities" (C.A. App. 548). The court further instructed that, as an additional element, the jury must find that "the particular defendant under consideration engaged in a pattern of racketeering activity * * * by knowingly

Nor is it improper to base a RICO conspiracy on two predicate acts of racketeering that consist of conspiracy and the consummated offense. It is axiomatic that a substantive crime and conspiracy are separate offenses for purposes of prosecution and punishment. See *e.g.*, *Iannelli* v. *United States*, 420 U.S. at 777; *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Conspiracy "poses distinct dangers quite apart from those of the substantive offense" (*Iannelli*, 420 U.S. at 778), including an increased likelihood that the conspiratorial objectives will be attained and that the participants will commit crimes unrelated to the original purpose for which the conspiracy was formed. See *Callanan* v. *United States*, 364 U.S. at 593-594.

The rationale that underlies this principle is particularly apt in this case. The evidence showed that petitioners engaged in a conspiracy lasting over a year and having as its objective not only the murder of a single individual, but the murder of all members of a competing criminal organization. During that period, petitioners and their henchmen planned and attempted various schemes for murdering Greene, each of which seriously jeopardized the safety of others. They recruited

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and willfully committing, or knowingly and willfully aiding and abetting, at least two acts of racketeering activity" (*id.* at 557).

This instruction is more favorable to the defendant than that prescribed by the decisions on which Calandra relies. In *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), and *United States* v. *Barton*, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981), the courts held that, in the context of a RICO conspiracy charge, it was sufficient for the government merely to demonstrate that the defendant agreed to perform at least two predicate acts. See also *United States* v. *Carter*, 721 F.2d 1514, 1531 (11th Cir. 1984). Here the instructions required the jury to find that petitioners willfully committed, or aided and abetted in the commission of, two acts of racketeering activity, not merely that they agreed to the commission of those offenses.

numerous hit men who participated in these schemes. To view the conspiracy to murder Greene merely as part and parcel of the consummated murder for purposes of the federal racketeering statute would be particularly unrealistic on the facts of this case.

In any event, 18 U.S.C. 1961(5) simply requires "two acts of racketeering activity." It does not require that those acts be separated in time or subject matter, or that they involve different participants. See *United States* v. *Phillips*, 664 F.2d at 1038-1039; *United States* v. *Starnes*, 644 F.2d 673, 677-678 (7th Cir.), cert. denied, 454 U.S. 826 (1981); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Because the act of conspiring to commit murder and the act of murder both qualify as racketeering acts under 18 U.S.C. 1961(1), and because conspiracy and the related substantive offense constitute separate illegal acts under both federal and state law, the statutory requirement was satisfied in this case.[14]

e. Finally, petitioner Liberatore urges (83-1801 Pet. 13-16) that, because he previously was convicted of bribery and conspiracy to commit bribery, double jeopardy principles preclude use of the same offenses as predicate acts to support his RICO conspiracy conviction. It is well established, however, that a defendant may be separately convicted and punished for substantive crimes and for a RICO violation that charges those crimes as

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[14] Licavoli also contends (83-1657 Pet. 6) that the court of appeals' statement that "[a]ll that is now required for a RICO offense is the commission of two predicate offenses * * *. No further indicia of 'enterprise' is now necessary" is contrary to this Court's decision in *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). In fact, the quoted language is from Judge Merritt's concurring opinion (Pet. App. A26). Moreover, while the Court held in *Turkette* that a racketeering enterprise is distinct, for purposes of proof, from predicate racketeering offenses, it went on to observe that the proof used to establish those separate elements "may in particular cases coalesce." 452 U.S. at 583.

predicate offenses. As the court explained in *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), "[t]he racketeering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions." See also, *e.g.*, *United States* v. *Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, No. 82-1225 (Apr. 4, 1983); *United States* v. *Hartley*, 678 F.2d 961, 991-992 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *United States* v. *Hawkins*, 658 F.2d 279, 287 (5th Cir. 1981); *United States* v. *Boylan*, 620 F.2d 359, 360-361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).[15]

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[15] Liberatore incorrectly relies (83-1801 Pet. 15) on the decisions of the Fifth Circuit in *United States* v. *Marable*, 578 F.2d 151 (1978), and *United States* v. *Ruigomez*, 576 F.2d 1149 (1978), to support his double jeopardy claim. In those cases, the court addressed the propriety of charging a single continuing drug conspiracy in separate indictments, not the question whether a substantive offense for which a defendant is convicted can also constitute a predicate offense in a RICO prosecution. On the latter issue, the Fifth Circuit is in agreement with the holding of the Ninth Circuit in *Rone*. See *United States* v. *Hawkins*, 658 F.2d at 287.

Liberatore also claims that use of a bribery conspiracy charge as a predicate act in a RICO conspiracy count constitutes multiple prosecution for a single conspiracy (83-1801 Pet. 15-16). That claim is erroneous for the reasons we have stated in response to Calandra's argument concerning a RICO conspiracy prosecution based, in part, on a conspiracy to commit murder. See pages 16-18, *supra*. In any event, as Liberatore acknowledges (83-1801 Pet. 3), the sentence on his racketeering conviction runs concurrently with the sentences imposed on his bribery convictions.

2. Petitioner Licavoli contends (83-1657 Pet. 10-13) that he was prejudiced by the district court's decision not to sever his case from that of his co-defendants. He notes that Geraldine Rabinowitz, the FBI file clerk who received payments from other co-conspirators in exchange for confidential FBI information, mentioned his name during her testimony, although the district court had previously ruled that evidence of the bribery scheme (of which Licavoli had earlier been acquitted) could not be considered against him.

The court of appeals correctly noted (Pet. App. A21-A23) that the general rule in conspiracy cases is that persons indicted together should be tried together, particularly when the offense charged may be established against all the defendants by the same evidence. See, *e.g.*, *United States* v. *Russell*, 703 F.2d 1243, 1247 (11th Cir. 1983); *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983); *United States* v. *Hamilton*, 689 F.2d 1262, 1275 (6th Cir. 1982), cert. denied, 459 U.S. 1116 (1983). That rule applies with full force when all defendants are charged in a RICO conspiracy count, even when, as here, they are not all named in connection with the same alleged predicate acts. See, *e.g.*, *United States* v. *Melton*, 689 F.2d 679, 686 (7th Cir. 1982); *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982) ("in a case of this nature, it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed"); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 (7th Cir.), cert. denied, 454 U.S. 1082 (1981).

The court of appeals correctly concluded that Licavoli failed to meet the "heavy burden * * * requiring a strong showing of prejudice" (*United States* v. *Davis*, 707 F.2d 880, 883 (6th Cir. 1983)) that is necessary to establish that the district court abused its discretion in denying a severance motion. Here, any potential for prejudice was reduced by the district court's redaction of the FBI

documents to remove references to Licavoli (C.A. App. 467). In addition, as the court of appeals observed (Pet. App. A22), the jury was carefully instructed that evidence of bribery was admissible only against Liberatore and Ciarcia, and there is no reason to believe that it was unable to confine its consideration of Rabinowitz's testimony to those two defendants.[16]

3. a. Following threshold determinations by the district court that petitioners had participated in a conspiracy and that statements made in furtherance of the scheme would be admissible against each of them (see Tr. 1584-1588, 2607, 2609, 2616-2617, 3108-3109), Aratari and Guiles testified about statements of Liberatore concerning the scheme. Several of the statements implicated Licavoli in the conspiracy and tended to show that he was responsible for directing the scheme. See 83-1657 Pet. 14-16. Liberatore did not testify at trial.

Licavoli maintains (83-1657 Pet. 13-18) that admission of Liberatore's out-of-court statements violated both the hearsay rule and the Sixth Amendment Confrontation Clause. This fact-bound claim was properly rejected by the court of appeals (Pet. App. A20).

Under Fed. R. Evid. 801(d)(2)(E), a statement is not hearsay if it is offered against a party and is a "statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." As Licavoli acknowledges (83-1657 Pet. 14), in order to admit statements of co-conspirators under this Rule it is necessary to show only that the defendant and the declarant were both participants in the conspiracy and that the statements in question were made in furtherance of the conspiracy. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *United States* v. *James*, 590 F.2d 575, 578 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979).

[16] The trial court repeated the cautionary instruction concerning the evidence of bribery on numerous occasions. See Tr. 15-16, 201, 460-461, 482, 500-501, 539-540, 936-937, 6529-6530; C.A. App. 531, 567, 575, 578.

The district court properly concluded that each of the prerequisites for admission of Liberatore's statements was satisfied. Evidence from other sources showed that Licavoli was instrumental in directing and financing the murder of Greene (see, *e.g.*, Tr. 1677-1680, 1714-1716, 2316-2317, 2333-2335). It also established that, in furtherance of this objective, Liberatore, acting as Licavoli's lieutenant, recruited two hit men and coordinated the efforts of two assassination teams, consisting of Ferritto, Carabbia, Aratari, and Guiles. Liberatore's statements to members of those teams were plainly in furtherance of the scheme.[17]

There is no substance to Licavoli's contention that, even if they fall within the scope of Rule 801(d)(2)(E), admission of the statements violated the Confrontation Clause of the Sixth Amendment. Satisfaction of an exception to the hearsay rule does not automatically fulfill the requirements of the Confrontation Clause. See *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155 (1970). However, the courts are in general agreement that, in most instances, a statement that is admissible under Rule 801(d)(2)(E) will be sufficiently reliable to satisfy the Confrontation Clause, without regard to the declarant's availability for cross-examination. See, *e.g.*, *United States* v. *Ammar*, 714 F.2d 238, 256 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Lurz*, 666 F.2d 69, 81 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 1136 (1982); *United States* v. *Peacock*, 654

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[17] In *United States* v. *Lawson*, 523 F.2d 804, 806 (5th Cir. 1975), on which Licavoli relies (83-1657 Pet. 16), the court noted that certain statements contained in wiretaps of telephone conversations admitted against him were made "with the knowledge of and on behalf of" the defendant. Rule 801(d)(2)(E) does not require such proof in connection with any co-conspirator statement. The court in *Lawson* was addressing the defendant's claim that there was insufficient evidence to show that he was a member of the conspiracy. Here there was ample evidence from other sources that Licavoli was a member of the conspiracy.

F.2d 339, 349 (5th Cir. 1981); *United States* v. *Nelson*, 603 F.2d 42, 46 (8th Cir. 1979); *United States* v. *Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); cf. *United States* v. *Perez*, 658 F.2d 654, 660-662 (9th Cir. 1981); *United States* v. *Wright*, 588 F.2d 31, 38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). If the declarant is found to be a co-participant in a criminal enterprise, he has an incentive to speak truthfully in connection with matters relating to the scheme. See, *e.g.*, *United States* v. *Nelson*, 603 F.2d at 47; *United States* v. *Papia*, 560 F.2d at 836 n.3. Virtually all of Liberatore's statements at issue here concerned the mutual objective of murdering Greene and were made to the hired assassins; therefore, Liberatore had every reason to speak truthfully about Licavoli's desires.

b. Nor is there any substance to Licavoli's claims (83-1657 Pet. 5, 9-10) that the trial court erred in admitting testimony that federal agents had been instructed "to monitor only conversations dealing with criminal activity" and that it improperly vouched for the credibility of government witnesses by instructing the jury concerning the participation of those witnesses in the Department of Justice Witness Protection Program.

The testimony concerning instructions to monitor conversations dealing with criminal activity (Tr. 6017) was in response to cross-examination by the defense suggesting that FBI agents acted unlawfully by indiscriminately intercepting and monitoring Licavoli's calls (Tr. 5971-5972, 5977). Under these circumstances, it was proper for the prosecution to present testimony about the scope of the surveillance warrant and the lawful manner in which it was executed in order to refute the inference of impropriety. Cf. *United States* v. *Jackson*, 509 F.2d 499, 507-508 (D.C. Cir. 1974) (testimony about execution of search warrant properly admitted). Moreover,

the trial court's immediate and comprehensive instruction to the jury concerning this testimony obviated the possibility of prejudice.[18]

During direct examination, the government elicited from several witnesses the fact that they were participants in the Department of Justice Witness Protection Program and had received subsistence allowances and other benefits from the government (see, *e.g.*, Tr. 5043-5044). The trial court subsequently instructed the jury that "[t]hrough the U.S. Marshal Service, the Attorney General of the United States is authorized to provide for the health, safety and welfare of witnesses * * * whenever in the judgment of the Attorney General testimony from or a willingness to testify by such a witness would place his life or person or the life or person of a member of his family or household in jeopardy" (C.A. App. 536). The court cautioned the jury, however, that "any decision to place a witness under the Witness Protection Program is solely an administrative decision in which no court participated" and that such participation bears only on the credibility of the witnesses and "may not be considered as any evidence or inference of guilt as to the acts charged against any of these defendants" (*id.* at 537).

Defendants often seek to impeach witnesses by showing that they received significant benefits in connection with participation in the Witness Protection Program.[19] The

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[18] The trial court instructed the jury, inter alia (C.A. App. 1218):

> the use of the term "criminal" in the answer [to the prosecutor's question] is not to be understood by the jury as offering any evidence whatsoever with reference to any of the Defendants in this case. It is merely a characterization the witness used in connection with whatever instructions he received in this matter.

[19] Indeed, Licavoli's attorney, during cross examination of a government witness, elicited substantial testimony concerning the witness's receipt of benefits from the government in connection

government may properly anticipate such impeachment by eliciting the fact that the witness was in the program, thus avoiding an inference that it has attempted to hide his possible bias. See *United States* v. *Thevis*, 665 F.2d 616, 637 (5th Cir. 1982), cert. denied, 459 U.S. 825 (1982); *United States* v. *Ciampaglia*, 628 F.2d 632, 639-640 (1st Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117 (1980); *United States* v. *Partin*, 552 F.2d 621, 644-645 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

The trial court's instruction concerning the Witness Protection Program was similar to those approved in *Partin*, 552 F.2d at 644, and *DiFrancesco*, 604 F.2d at 775. Far from constituting a "judicial vouching" for the integrity of the decision to place the witness in the program (83-1657 Pet. 10), the instruction was a carefully balanced admonition that no court had participated in the administrative decision and that the decision could not be considered in determining the question of guilt.

4. Finally, Licavoli claims (83-1657 Pet. 19-22) that the jury instructions failed adequately to distinguish between the concepts of aiding and abetting and conspiracy. As a result, he maintains, the jury could have predicated his RICO conspiracy conviction on a determination either that he aided and abetted the murder of Greene or that he participated in the conspiracy, without determining that he participated in both predicate offenses; alternatively, he suggests that the instructions could have led to a lack of juror unanimity.

Although Licavoli has not specified the portion of the charge to which his objections are directed, presumably he refers to the instruction concerning the predicate act involving conspiracy, which stated that to show that a defendant "committed the predicate act of conspiracy to

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with the Witness Protection Program (*e.g.*, Tr. 5136-5137, 5146, 5148-5149).

murder Daniel J. Greene, the government must prove * * * that such defendant planned or aided one or more defendants or co-conspirators in planning the commission of the Greene murder" (C.A. App. 563; see also *id.* at 559). That language merely advised the jury that a defendant need not have been the sole or principal architect of the conspiratorial plan in order to be found guilty of participation in the conspiracy, but could have aided in *planning* of the murder. The instruction is fully consistent with settled principles of conspiracy law and did not in any way furnish the jury with alternative grounds on which to find Licavoli guilty. See *United States* v. *Guy*, 456 F.2d 1157, 1165 & n.4 (8th Cir.), cert. denied, 409 U.S. 896 (1972).

Moreover, the court instructed the jury that, before it could convict Licavoli, it was required to find that he had committed *both* of the predicate acts charged—conspiracy to murder and the murder itself (C.A. App. 557-558). That instruction obviated any possibility that, in reaching a verdict, the jury might have found that Licavoli committed only one predicate offense or that some jurors might have based their decisions on different predicate acts than others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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